

IN THE SUPREME COURT  
APPEAL FROM MICHIGAN COURT OF APPEALS

*In re* APPLICATION OF MICHIGAN ELECTRIC  
TRANSMISSION COMPANY FOR  
TRANSMISSION LINE

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CHARTER TOWNSHIP OF OSHTEMO,  
Appellant,

v

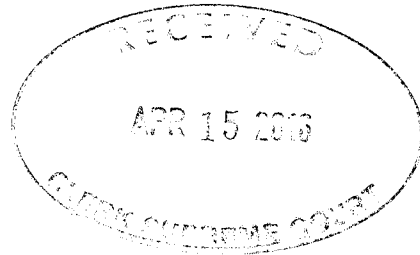
MICHIGAN ELECTRIC TRANSMISSION  
COMPANY LLC,  
Petitioner-Appellee,

and

MICHIGAN PUBLIC SERVICE COMMISSION,  
Appellee.

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SC: 150695  
COA: 317893  
MPSC No.: 00-017041



APPELLANT OSHTEMO CHARTER TOWNSHIP'S  
BRIEF IN REPLY TO APPELLEE MPSC'S BRIEF ON APPEAL

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Dated: April 14, 2016

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## INTRODUCTION

Appellee MPSC's brief argues that Michigan's Constitution with regard to the consent clause of art 7, § 29 should be ignored or tortuously interpreted else "the lights will go out in Michigan." (MPSC brief, p 1). It warns of the dangers of giving every local municipality in the state "the ability to block every utility infrastructure improvement for no reason, no matter how inconsequential . . ." (MPSC brief, p 1).

Stripping this argument bare to its essentials, Appellee's argument is that any opportunity to deny a utility infrastructure request is destabilizing to the electrical grid and will bring about its ultimate demise. This argument is without merit in that it distorts the true argument of Appellant in this case. The argument is even more absurd in that utilities are – even under Appellee's proposed interpretation of the Constitution – subject to a process for review and approval and judicial review of that approval, i.e., the certification process which is called for in the Electric Transmission Line Certification Act (ETLCA). If the MPSC's argument as to municipal consent and review were valid, the certification process would be just as much a potential destabilizer.

Reading the Constitution as it is plainly and clearly written to provide local municipalities' consent for utility lines will NOT allow blocking for NO reason or for INCONSEQUENTIAL reasons. Appellant recognizes that consent must not be arbitrarily or unreasonably withheld or conditioned. Denial of consent would not be without recourse. Any denial or consent with conditions would be subject to judicial review and full due process.

## STANDARD OF REVIEW

Appellee's brief states an erroneous standard of review, quoting case law that pertains to review of MPSC orders attempting to convince this Court that Appellant has a heavy burden of

proof to overturn the MPSC in this case. There is, however, no question that the well established standard of review is de novo. *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 89; 803 NW2d 674 (2011). See Appellant's brief on appeal as to standard of review.

## ARGUMENTS

### I.A. APPELLEE MPSC'S REASONING THAT THE ETLCA DOES NOT DEPRIVE APPELLANT TOWNSHIP OF ITS CONSTITUTIONAL RIGHT OF CONSENT IS BASED ON A MISAPPLICATION OF LAW AND LOGIC.

Appellee MPSC states the following to argue that the Township has no right of consent as stated in Const 1963, art 7, § 29:

“(1) under article 7, § 17, the township's authority is not unlimited but rather is controlled by law; (2) the law that gives townships the authority to enact zoning ordinances in the first place (i.e., the Zoning Enabling Act) specifically provides that zoning ordinances are subject to another relevant statute (the Certification Act); and (3) the Certification Act provides that a certificate of necessity trumps a conflicting ordinance.” (MPSC brief, p 25).

Appellee MPSC premises its argument that the consent called for in art 7, § 29 should be ignored, on Const 1963, art 7, § 17 which provides: “Each organized township shall be a body corporate **with powers and immunities provided by law.**” (Emphasis added.) Then Appellee asserts:

“Townships, unlike cities, do not have any inherent police powers. The township only has that power granted it by the Legislature via the Zoning Enabling Act, which makes all zoning specifically subject to ETLCA.” (MPSC brief, p 2).

This is a shockingly wrong statement of the law. It is true that townships have no inherent powers, and they only possess powers conferred on them by the Legislature or the Michigan Constitution. *Howell Twp v Roto Corp*, 258 Mich App 470, 475; 670 NW2d 713 (2003). However, townships are not limited to the authority granted to them in the Michigan Zoning

Enabling Act, MCL 125.3205. See also, *Hess v Cannon Township*, 265 Mich App 582, 590; 696 NW2d 742 (2005). In *Hess*, the Court noted Const. 1963, art. 7, § 34, which states:

The provisions of this constitution and law concerning counties, townships, cities and villages shall be *liberally construed* in their favor. Powers granted to counties and townships by this constitution and by law shall include those *fairly implied* and *not prohibited* by this constitution. [Emphasis added.]

The Township Ordinance Act, MCL 41.181, et seq, is the basic enabling act granting townships the power to enact ordinances that regulate the public health, safety, and general welfare.” *Hess, supra*. Moreover, the Charter Township Act provides charter townships like Appellant with additional authority. See MCL 42.1 et seq.

Specifically, MCL 42.15 states:

“The township board of any charter township may enact such ordinances as may be deemed necessary to provide for the public peace and health and for the safety of persons and property therein, and may by ordinance prescribe the terms and conditions upon which licenses may be granted, suspended, or revoked; and may in such ordinances require and exact payment of such reasonable sums for any licenses as it may deem proper. The persons receiving the licenses shall, before the issuing thereof, execute a bond to the township when required by any ordinance in such sum and with such securities as prescribed by such ordinance, conditioned for the faithful observance of this act, and the ordinance under which the license is granted.”

The Township’s Utility Ordinance is a police power ordinance adopted pursuant not only to the Ordinance power granted to it by the Township Ordinance Act and the Charter Township Act but also by Michigan’s Constitution.

Township authority and power is conferred not only by the Legislature but also by the People in Michigan’s CONSTITUTION. Appellee quotes art 7, § 17 but fails to recognize that the Constitution is a law. **The Constitution is itself a source of township power and**

**authority.** Thus, art 7, § 17 only serves to bolster the argument that the consent clause of art 7, § 29 is a valid source of township authority and power, not the opposite.

The argument that the Michigan Zoning Enabling Act and its limitation that enactments by the Township thereunder are subject to the ETLCA has the same fundamental flaw as the argument the Township's consent power is superseded or preempted by the ETLCA itself. The Legislature does not have the authority to negate a constitutional provision. *Attorney General ex rel. O'Hara v Montgomery*, 275 Mich 504; 267 NW 550 (1936). Constitutional mandates cannot be restricted or limited by the whims of a legislative body through enactment of a statute." *AFSCME Council 25 v Wayne County*, 292 Mich App 68, 93; 811 NW2d 4 (2011).

Appellee MPSC mentions the "duly constituted authority" language of art 7, § 29 as if this is language providing a limitation on power. Section 29 states in the first sentence as follows:

"No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county township city or village for wires poles, pipes, tracks, conduits or other utility facilities, **without the consent of the duly constituted authority of the county, township, city or village . . .**" (Emphasis added.)

The MPSC is misreading this language. It refers to the consent having to be granted by the appropriate "body" of the municipality. In the case of a township, that is the Township Board. This does not mean that the consent has to be "duly constituted," but that, for example, the Township building inspector could not grant the consent.

Appellee METC has argued, and the Court of Appeals agreed that the general provisions of art 7, § 22 should limit the specific authority of § 29. Appellant has previously argued extensively as to why this is not in keeping with established law and unsupported by logic or the



rules of constitutional construction. Interestingly, Appellee MPSC argues that § 22 does not even apply here because it does not mention townships, only cities and villages. This is true. A strict reading of § 22 does reveal townships are not mentioned. Therefore, any restrictions on authority therein would be inapplicable. Nevertheless, the MPSC then goes on to argue that art 7, § 17 is applicable to townships and somehow limits the Township to only those authorities provided by the Legislature. WRONG. Section 17 provides the Township “legislative and administrative powers and duties shall be **provided by law.**” The section says provided by LAW, not provided by the Legislature. Michigan’s Constitution is a law. Thus, the power and duty of consent set forth in § 29 is **provided by law.**

Further, even if art 7, § 17 were somehow read to not include the constitution as law, using § 17 to negate § 29’s consent is still elevating the general over the specific in that § 17 does not specifically mention the Township’s authority with regard to utilities and § 29 does. The MPSC states:

“[w]hen there is conflict between general and specific provisions in a constitution, the specific provision must control.” Advisory Opinion on Constitutionality of 1978 PA 426, 403 Mich 631, 639-40 (1978) citing McDonald v Schnipke, 380 Mich. 14, 20 (1968); Hart v Wayne County, 396 Mich. 259, 273 (1976). However, in this case there is no conflict between the constitutional provisions. Rather the constitutional provisions are harmonious.” (MPSC brief, p 26).

Appellant MPSC is correct about the law but incorrect that there is harmony in the position that the Township has no right of consent to utility lines under its interpretation. Appellant’s interpretation clearly negates a constitutional mandate and should not be adopted.

I. B. AND C. THE ETLCA DOES INTERFERE WITH THE TOWNSHIP'S  
CONSTITUTIONAL RIGHT TO CONSENT.

Appellee MPSC in these Sections again mischaracterizes and misinterprets in an effort to assert that denial/negation of the Township's opportunity to consent does not interfere with the Township's constitutional right of consent. The MPSC quotes Const 1963, art 7, § 29 and then states:

“The Township interprets this provision as granting municipalities the right to consent or withhold consent to utility activities within their borders unfettered by state law.” (MPSC brief, p 27).

Again, this argument fails to recognize that Michigan's Constitution is in fact, itself, law. And the Township has never argued that its right of consent could be arbitrarily withheld or unfettered. It is Appellees who both seem to assert that any opportunity for the Township to consent to the utility lines in this case is a violation of the ETLCA and inherently unreasonable.

As to Appellee's arguments concerning *City of Lansing v State of Michigan and Wolverine Pipe Line Company*, 275 Mich App 423; 737 NW2d 818 (2007), please see Argument Sections III. and IV.A. of Appellant's brief on appeal. See also Argument Section II.B. of Appellant's reply to METC brief.

Much of Appellee's argument in this section has to do with whether consent is reasonably withheld or conditioned. In this case, there was never an opportunity for Township Board consent to the instant utility lines, so there is no way to review whether that such consent or denial thereof would have been reasonable. This Court should not engage in a speculative review of what the Township's consent or lack thereof had it been allowed to conduct the consent process here.

The question in this case is a simple one: does the Constitution's mandate of local consent to utility lines mean a municipality has an opportunity of consent despite the ETLCA's

purported “preemption” of that right through the certificate process? Appellee’s arguments are more of the same tortured reasoning to get to the point that somehow the right of consent means no consent is necessary.

Appellee MPSC mischaracterizes its own order in this case by attempting to assert that somehow the Township was given the opportunity to consent and its Public Utility Ordinance applied in the process of granting the certificate under the ETLCA. In fact, the MPSC did not recognize the Township’s right of consent. Instead it determined that § 10 of the ETLCA “preempts the Oshtemo Ordinance.” Instead of reviewing a conditioned consent by the Township to determine if the condition was reasonable, the MPSC held that the Township had the burden of proving underground lines were practical and their expense reasonable. (See Appendix p 227-228). This turns consent and the burden of review of that consent on its ear and results in a deprivation of the Township’s constitutional right to consent.

The granting or withholding of consent by the Township is a discretionary legislative function, and the Township has the right to grant or withhold consent under Const. 1963, art. 7, § 29, provided the Township’s decision is not arbitrary and unreasonable. *Union Township v City of Mt. Pleasant*, 381 Mich 82, 90; 158 NW2d 905 (1968). *City of South Haven v South Haven Charter Township*, 204 Mich App 49, 52; 514 NW2d 176 (1994). On judicial review, the burden of proof is on the party challenging the Township’s decision, not on the Township. *Plymouth v City of Detroit*, 423 Mich 106, 134; 377 NW2d 689 (1985). Because the MPSC determined that the Township’s consent was preempted by its certificate under the ELTCA, it erroneously placed the burden of proof on the Township.

II. AND III. THE TOWNSHIP'S ORDINANCE IS NOT IN CONFLICT WITH LAW.

Please review Argument IV. of Appellant's brief on appeal and Appellant's reply to METC's brief, Section II. C.

SUMMARY AND REQUEST FOR REFLIEF

Michigan's Constitution, in art 7, § 29 mandates municipal consent for the establishment of utility lines like those at issue in this case. Appellees, in arguing to uphold the orders of the MPSC and Court of Appeals, ignore the unambiguous, and common understanding in that section; moreover, they elevate general language in the Constitution over § 29's specific language, to reason that the consent provision is appropriately negated by the ETLCA. Moreover, Appellees ignore that the Township never exercised an opportunity to consent due to the fact that the MPSC found that the Township's Ordinance was preempted by the ETLCA, and the certificate it granted thereunder took precedence over a municipal approval. Therefore, whether the Township would have denied consent or in what way approval would have been conditioned is speculative at best. The Township submits that its Ordinance is not unreasonable or in conflict with law, and thus, if applied to the utility lines herein would have been supported by law. The order of the MPSC and Court of Appeals affirming same should be reversed, and METC required to submit itself to the process of consent by the Township.

Respectfully submitted,

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